95-644

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MCKESSON CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Iran is subject to suit under the "direct effect" clause of the commercial activity exception to sovereign immunity, as interpreted in *Weltover v. Republic of Argentina*, 504 U.S. _____, 119 L.Ed. 2d 394 (1992), where an Iranian corporation, whose majority shareholders were agencies or instrumentalities of Iran, allegedly breached obligations in Iran, but there was no obligation to make payment in the United States.

2. Whether Iran is subject to suit by the Overseas Private Investment Corporation, an agency of the United States, under any exception to sovereign immunity when an agreement between the United States and Iran provides that any claims against the Government of Iran to which the Government of the United States may be subrogated "shall" be the subject of direct negotiation between the two Governments and if the dispute cannot be settled by mutual agreement the matter "shall" be referred to final and binding arbitration.

PARTIES TO THE PROCEEDING IN THE COURT BELOW

1. The Islamic Republic of Iran ("Iran"), a foreign state, defendant-appellant.

2. The Overseas Private Investment Corporation ("OPIC"), an instrumentality of the United States Government, and McKesson Corporation and its wholly-owned subsidiaries, Foremost Tehran, Inc., Foremost Shir, Inc., and Foremost Foods, Inc., domestic United States corporations (collectively "McKesson"), plaintiffs-appellants.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, the Islamic Republic of Iran, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered on April 14, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 52 F.3d 346, and is reprinted as Appendix A. The orders of the court of appeals denying Iran's (1) motion for clarification and (2) petition for rehearing and suggestion for rehearing *en banc* are attached as Appendices B and C. The judgment of the court of appeals is reprinted as Appendix D. The final opinion of the United States District Court for the District of Columbia is reported only at 1993

U.S. Dist. LEXIS 11792, and is reprinted as Appendix E. An earlier opinion of the court of appeals is reported at 905 F.2d 438 and reprinted as Appendix F. Finally, an award of the Iran-United States Claims Tribunal is relevant. It is reported at 10 Iran-U.S. Cl.Trib.Rep. 228 (1986), and is reprinted as Appendix G.

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JURISDICTION

The judgment of the court of appeals was entered on April 14, 1995. App. A. The petition for rehearing and suggestion for rehearing *en banc* was denied on July 25, 1995. App. C. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION AND INTERNATIONAL AGREEMENT INVOLVED

The statute involved is the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330 and 1602-1611 ("FSIA"). The pertinent provision is the "direct effect" clause of the commercial activity exception to foreign sovereign immunity, §1605(a)(2), which reads:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States...in any case ... in which the action is based ...upon an act outside the territory of the United States in connection with a commercial activity elsewhere and that act causes a direct effect in the United States.

The international agreement involved is the Agreement Between the United States and Iran on Guaranty of Private Investments, exchange of notes in Tehran September 17 and 21, 1957; entered into force September 24, 1957, T.I.A.S. No. 3913, 8 U.S.T. 1599 (hereafter "Investment Guaranty

Agreement'') and is reprinted as Appendix H. Article 3c of the Investment Guaranty Agreement provides:

> c. That any claim against the Government of Iran to which the Government of the United States of America may be subrogated as a result of any payment under such guaranty shall be the subject of direct negotiation between the two Governments. If within a reasonable period of time the two Governments are unable to settle the dispute by mutual agreement, the matter shall be referred for final and binding determination to a sole arbitrator to be selected by mutual agreement. If the two Governments are unable, within three months, to reach an agreement on the selection of arbitrator, the arbitrator shall be such person as may be designated by the President of the International Court of Justice at the request of either Government.

App. 163a-164a.

STATEMENT OF THE CASE

This case has its genesis in the Iranian Revolution of 1979.

In 1982, OPIC and McKesson brought suit under the FSIA against Iran and five of its alleged instrumentalities for the taking of McKesson's equity interest in the fifth instrumentality, Pak Dairy, an Iranian corporation. The other four instrumentalities were alleged to own a majority of Pak Dairy's stock. OPIC and McKesson claimed that McKesson's interest in the dairy company was expropriated by Pak Dairy's board of directors at the instigation of four shareholding instrumentalities that, in turn, were acting under the direction of Iran.

The jurisdiction of the district court was invoked under the

FSIA, 28 U.S.C. §1330, and under 28 U.S.C. §1331 and the Treaty of Amity, Economic Relations and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899, T.I.A.S. No. 3853 (1955).

The suit was stayed pursuant to Executive Order 12294,[1] while the identical claim was presented to the Iran-United States Claims Tribunal ("Tribunal").

In 1986, the Tribunal awarded McKesson compensation for unpaid dividends declared by Pak Dairy in 1979 and 1980, and for breaches of certain contractual undertakings, but concluded that as of its jurisdictional cut-off date of January 19, 1981, the interference with McKesson's shareholder's rights had not amounted to an expropriation. *Foremost v. Government of Iran*, 10 Iran-U.S. Cl.Trib.Rep. 228, 250 (1986);[2] App. 133a; *see also, Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438, 441 (D.C.Cir. 1990) (*"McKesson I"*); App. 72a.

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[1]46 F.R. 14111, dated February 26, 1981; *see, Dames & Moore v. Regan*, 453 U.S. 654, 684-685 (1981).

[2]In its first decision denying Iran's motion to dismiss for lack of subject-matter jurisdiction under the FSIA, the district court reserved the question whether the Tribunal's award bars further litigation in the United States of OPIC and McKesson's expropriation claim against Iran. Art. IV, para. 1, of the Claims Settlement Declaration of the Algiers Accords of January 19, 1981, 20 Int'l L. Mat. 224, 232 (1981), provides that "[a]ll decisions and awards of the Tribunal shall be final and binding." In Principle B of the Declaration of the Government of the Democratic and Popular Republic of Algeria in those Accords, the United States agreed to "terminate all legal proceedings in the United States courts involving claims of United States persons and institutions against Iran and its state enterprises, . . ., to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration." 20 Int'l L. Mat., *supra*, at 224.

Iran requested the Tribunal to adjudicate the United States in default of its obligations under Article IV(1) of the Claims Settlement Declaration. The Tribunal recently heard oral argument in that case, but no decisions has been issued.

Two years later, in 1988, McKesson revived its suit in the district court, and that court denied Iran's motion to dismiss for lack of subject-matter jurisdiction.

On Iran's first appeal, the court of appeals ruled that the effects in the United States alleged by OPIC and McKesson — the "freezing out" of the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging between the United States and Iran to support Pak Dairy" — were sufficiently "foreseeable, substantial and direct" to survive Iran's motion to dismiss. *Id.* at 451; App. 98a. The case was, however, remanded for findings on Iran's claimed control over Pak Dairy. *Id.* at 453; App. 102a.

While the parties were engaged in jurisdictional discovery, this Court decided *Weltover, supra.* The Court rejected the "substantial and foreseeable" interpretation of the direct effect clause that *McKesson I* had followed, and adopted the "immediate consequence" test. *Weltover,* 119 L.Ed. 2d at 407. The Court concluded that in that case such an immediate consequence in the United States had been established because Argentina had breached its obligation to Weltover to make payment in New York. *Id.*

Following the conclusion of the jurisdictional discovery, Iran renewed its motion to dismiss for lack of subject-matter jurisdiction. Its jurisdictional challenge was based on the *Weltover* Court's interpretation of the direct effect clause. Here, none of Pak Dairy's alleged breaches had a direct effect in the United States, because there was no contractual duty that Pak Dairy make any payments in the United States. The district court found that "[a]s a direct, and immediate, consequence of Iran's allegedly wrongful acts, there was a discontinuance of dividends, a stoppage of shareholder communications, and a cessation in the transfer of machinery and

other supplies between the two countries, the impact of which was felt in the United States." App. 69a.[3]

On Iran's second appeal, the court below also rejected Iran's direct effect argument, reasoning that although *Weltover* had rendered superfluous *McKesson I*'s discussion of why the effects were "foreseeable" and "substantial," it had not undermined the Court's separate analysis that the effects were also "direct." *McKesson Corporation et al. v. Islamic Republic of Iran*, 52 F.3d 346, 351 (D.C.Cir. 1995) ("*McKesson II*"); App. 8a-10a. The court concluded that "[b]ecause this portion of our prior opinion is unaffected by *Weltover*, it remains the law of the case, not subject to reconsideration in this second interlocutory appeal." *McKesson II*, at 351; App. 9a-10a.

After the court below denied Iran's petition for rehearing and suggestion for rehearing *en banc*, a new argument supporting dismissal for lack of subject-matter jurisdiction was brought for the first time to the attention of counsel, *viz.*, that, at least with respect to OPIC, the suit against Iran is in violation of an international agreement between the United States and Iran. Investment Guaranty Agreement, App. 162a-164a. Because lack of subject-matter jurisdiction may be raised at any time, *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982), Iran also presents this argument in support of its petition for a writ of certiorari.

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[3]The district court also found that Iran exerted enough control over Pak Dairy's Board to justify attributing the alleged expropriatory acts of its Board of Directors to Iran. App. 62a-66a. Although Iran challenged this ruling on appeal and on its petition for rehearing, it does not do so here.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S DECISION IN *WELTOVER* AND ALL CIRCUIT COURT DECISIONS THAT HAVE APPLIED THE DIRECT EFFECT TEST SINCE *WELTOVER*.

As noted, on the first appeal the court of appeals ruled that the "freezing out" of the "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging between the United States and Iran to support Pak Dairy" were sufficiently "foreseeable, substantial and direct" to survive Iran's motion to dismiss. *McKesson I* at 451; App. 96a-98a. Significantly, all contractual relations were entered into and were to be performed in Iran. On the second appeal, the court of appeals explained why, despite the reference to "substantial and foreseeable" in its first decision, the acts noted in its first decision were sufficiently "direct" to confer jurisdiction following *Weltover*. *McKesson II* at 351; App. 8a-10a.

The opinion, however, never explained why, after *Weltover*, claims based on acts alleged to have a direct effect in the United States should be permitted to go to trial where no contractual obligation to pay in the United States was alleged, much less, after jurisdictional discovery, proven by a preponderance of the evidence. Iran drew this difficulty to the attention of the court of appeals first in a motion for clarification and, when that was denied, in a petition for rehearing and suggestion for rehearing *en banc*, which was also denied.

There was no allegation in the complaint nor proof in the record that there was any obligation to pay in the United States with respect to any item in the court of appeals' list of jurisdiction-conferring acts. That is, there was no obligation

on the part of Pak Dairy to provide capital in the United States, management personnel in the United States, machinery, *etc.*, in the United States, nor was there any obligation to pay in the United States for the services that persons performed in Iran, or for the use of equipment sent from the United States to Iran, or to pay dividends in the United States. Rather, dividends were paid in Iran in local currency.

The record is clear on this issue. Iran's opening brief on appeal (at 17) asserted the lack of any affiliating contacts between Pak Dairy or its Board of Directors and the United States. Respondents' brief in opposition (at 13 and note 7) asserted only that certain invoices were payable in the United States, but upon examination, it turned out that the invoices were payable in U.S. currency in Iran, not in the United States (Iran's reply brief at 17-18 and note 2).[4] It is important to note that in neither of its opinions (App. 1a-14a and 72a-102a) did the court below make any finding that any of the acts found to confer jurisdiction in its first opinion involved an obligation to pay in the United States.

Nor did the court below base its conclusion on the ground that the cumulative effect of the acts performed by Pak Dairy in Iran resulted in an obligation to pay in the Untied States. Had it done so, that finding would have been contrary to established doctrine. In deciding whether there is jurisdiction under the FSIA's commercial activity exception to sovereign immunity for an "act outside of the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States," 28 U.S.C. §1605(a)(2), each "act" must be viewed separately to determine whether that act has a direct effect

[4]Furthermore, the claims based on these invoices had been adjudicated with final effect by the Iran-U.S. Claims Tribunal and the award in favor of McKesson was paid in full. Iran's reply brief below (at 18, n. 2); Tribunal Award, App. 140a.

in the United States. *See, Saudi Arabia v. Nelson*, 507 U.S. ____. 123 L.Ed.2d 47, 59 (1993) (stressing the difference in wordings between the first and third clauses of §1605(a)(2)); *Millen Industries, Inc. v. Coordination Council*, 855 F.2d 879, 885 (D.C.Cir. 1988) (separating commercial and sovereign acts).

This leaves the possibility that the court below adopted *sub silentio* respondents' proposed exception to *Weltover*'s requirement of an obligation to pay in the United States, *viz.*, where there were "close commercial ties between a foreign defendant and a United States plaintiff, including a constant flow of funds, goods and services, which were directly affected by conduct attributable to the foreign government." Respondents' brief at 10-11. We have no way of knowing whether the court accepted this argument. The court declined to explicate whether it did so, and the intimations in the opinion are ambivalent.

In a footnote, the court addressed Iran's argument that nonpayment of dividends did not cause a direct effect in the United States because the dividends were payable in Rials in Tehran, Iran. The court explained that its earlier decision was controlling and that "it did not mention, as a direct effect, Pak Dairy's failure to pay cash dividends to McKesson." *McKesson II* at 351, n. 9; App 9a. Iran would take comfort in this footnote were it not for the fact that the judgment of the district court denying Iran's motion to dismiss was affirmed without any qualification, and the district court unequivocally stated that it had jurisdiction as a result of the "discontinuance of dividends," App. 69a.

The new standard for a "direct effect" that respondents suggested below, namely, that a direct effect always results where the plaintiff is a U.S. national and there are "close commercial ties" to the foreign defendant is simply a reinstate-

ment of the "substantial and foreseeable" test. This Court, however, expressly rejected such a gloss on §1605(a)(2):

> . . . we reject the suggestion that §1605(a)(2) contains any unexpressed requirement of "substantiality" or "foreseeability." As the court of Appeals [for the Second Circuit] recognized, an effect is "direct" if it follows "as an immediate consequence of the defendant's activity." [quoting *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d. Cir. 1991)].

Weltover, 119 L.Ed. 2d, at 407.

This language makes no exception for cases where there are close "commercial ties" between a foreign sovereign defendant and a United States plaintiff. Nor is there any language elsewhere in the *Weltover* decision, or in the FSIA for that matter, suggesting that "direct" means "follow[ing] as an immediate consequence" where the plaintiff is an alien but that meaning changes to "substantial and foreseeable" where the plaintiff is a U.S. national that had close commercial ties with the foreign defendant abroad. Furthermore, the exception urged by OPIC and McKesson below is so fundamental that it seems extremely improbable that this Court would not have expressed or intimated it in *Weltover* if such an exception were intended.

Finally, this Court has twice disapproved drawing distinctions between citizens and aliens when determining jurisdiction under the FSIA. That argument was made and rejected in *Weltover*:

> We reject Argentina's suggestion that the "direct effect" requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States. We expressly stated in *Verlinden [B.V. v. Central Bank of Nigeria,*

461 U.S. 480 (1983)] that the FSIA permits "a foreign plaintiff to sue a foreign sovereign in the courts of the United States, provided the substantive requirements of the Act are satisfied," 461 U.S., at 589....

Weltover, supra, at 408.

All Circuits that have addressed the issue applying the "immediate consequence" test have rejected the argument that there is an exception to *Weltover*'s ruling on "direct effect" where the plaintiff is a U.S. national and the plaintiffs' dealings with the foreign state are substantial. Three Circuit court cases decided since *Weltover* are on point.

In *United World Trade, Inc. v. Mangyshlakneft Oil Prod. Ass'n,* 33 F.3d 1232 (10th Cir. 1994), a Colorado corporation had entered into a contract involving more than a million metric tons of crude oil with the Republic of Kazakhstan's parastatal oil company. According to the plaintiff the Kazakhstan entity defaulted after the delivery of three tanker shiploads of oil. However, although the plaintiff was a U.S. national, and the contract involved a very large sum of money and even required payment in U.S. dollars, the Tenth Circuit found no subject-matter jurisdiction because the contract was payable in Paris or London, not in the United States. *Id.,* at 1237-1240.

In *Antares Aircraft v. Federal Republic of Nigeria,* 948 F.2d 90 (2d Cir. 1991), *vacated and remanded for further consideration in light of Weltover,* 120 L.Ed.2d 892 (1992), *aff'd on remand,* 999 F.2d 33 (1993), *cert. denied,* 127 L.Ed.2d 74 (1994), the plaintiff, a United States partnership, claimed that the Federal Republic of Nigeria had unlawfully detained its aircraft in Lagos, Nigeria with the result that the partnership was forced to pay $100,000 to Nigeria from a New York bank account. The Second Circuit found no direct effect, although the plaintiff was a United States entity and the damages claimed

were considerable, because no legally significant act had occurred in the United States. 999 F.2d at 36-37.

In *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1385-1386 (8th Cir. 1993), a subsidiary of General Electric sued Air Canada on the ground, *inter alia*, that its misrepresentations had caused the subsidiary to pay too much money when it acquired another company in the United States. Although Air Canada quite clearly has many contacts with the United States and the United States plaintiff claimed a large loss, the Eighth Circuit found that the effect was not direct. *Id.*, at 1386.

Before this Court's decision in *Weltover*, the Ninth Circuit interpreted "direct effect" in contract cases to require both an obligation to pay in the United States and that the plaintiff be a U.S. national. *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989). In that case, there were close commercial ties between the plaintiff, a United States citizen and a California corporation, and the Soviet Ministry of Foreign Trade and certain Soviet foreign trading organizations. The complaint alleged that the plaintiffs had shipped medical equipment ordered from the United States on three occasions between 1982 and 1984, for which the defendants had not paid, and the district court entered a default on the contract claims. The Ninth Circuit reversed and remanded the case for discovery as to whether the contracts in question had required payment in the United States. *Gregorian, supra*, at 1528. Accordingly, it is clear that the Ninth Circuit also rejects respondents' proposition that there is an exception to the *Weltover* test for U.S. plaintiffs with close commercial ties to the foreign state entity.

The status of this case is that there has been jurisdictional discovery, Iran's motion to dismiss for lack of subject-matter jurisdiction has been denied, the court of appeals has affirmed the denial, and the mandate returning the case to the district court has issued. The case will now go to trial on the merits

with jurisdiction based on the direct effect exception although there was no contractual obligation to pay in the United States. Thus, the effect of the court of appeals' decision is to allow a case to go to trial in the District of Columbia Circuit that would not be permitted to go to trial in the Second, Eighth, Ninth, or Tenth Circuit, nor as far as we know in any other Circuit, and in complete disregard of *Weltover*.

This conflicting interpretation of "direct effect" by the Circuits merits review by this Court.

II. THE DECISION OF THE COURT BELOW GIVES THE APPEARANCE OF PARTIALITY AGAINST A FOREIGN SOVEREIGN.

The decision of the court of appeals also calls into question the impartiality of United States courts when the relations between the defendant foreign state and the United States are strained. *See generally,* W. Eskridge,[5] "The Iranian Nationalization Cases: Toward a General Theory of Jurisdiction over Foreign States," 22 Harv. Int'l L. Rev. 525 (1981)(arguing that U.S. courts should have found no jurisdiction in those cases).

The instant case is particularly sensitive for three reasons. First, the lead plaintiff is an agency of the United States Government suing a foreign state in a domestic court of the United States. Such a suit, we believe, is unprecedented. Second, respondents explicitly relied on "anti-Americanism" as a ground for attributing the actions of the four shareholding instrumentalities to the State of Iran, and the district court was persuaded: "Evidence of anti-Americanism is relevant to show that Iran's codefendants, in their actions on the Pak

[5]Professor Eskridge is now teaching at Yale Law School. At the time he wrote the article he was an attorney in private practice with a law firm that was then representing Iranian governmental entities.

Dairy Board, were acting in the interest of the Iranian Government, and that their interests were the same as the government's." App. 40a. Finally, the Court can take judicial notice that the strained relations between the United States and Iran have persisted from the inception of the Iranian Revolution in 1979 up to the present day, as is evidenced by the Executive's recent imposition of a total embargo on trade with Iran.[6]

This Court has in the past granted certiorari in order to correct partiality in lower courts. *See, Zschernig v. Miller*, 389 U.S. 429, 434-435, 437 (1968) (reproving Oregon courts for seeking the "democracy quotient" of a foreign regime, in this case, Yugoslavia, rather than respecting U.S. treaty with foreign state concerning inheritance); *Kolovrat v. Oregon*, 366 U.S. 187 (1961)(Oregon law regarding the right of foreign nationals to inherit property in Oregon must yield to federal treaties despite Oregon court doubts that legatee in Communist Yugoslavia would actually receive benefit of legacy).

With the highest respect to the district court and the court of appeals, any neutral observer who has read *Weltover* and *McKesson II* must suspect that the reason for the result is the identity of the petitioner. This suspicion deepens when it is noted that the court of appeals repeatedly - in its opinion, in response to Iran's motion for clarification, and on Iran's petition for rehearing and suggestion for rehearing *en banc* - declined to rule on the principal[7] issue briefed by the parties, *viz.*, whether the *Weltover* direct effect test applies where the plaintiff is a United States national and the economic effect is substantial. Had the court of appeals ruled on the issue as presented by the parties, the result would have been dis-

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[6]Executive Order 12059, May 6, 1995, 60 F.R. 24757.

[7]Although Iran's opening brief devoted more pages to the attribution issue, the direct effect issue was argued first.

missal for lack of subject-matter jurisdiction under the FSIA, as all other Circuit courts have ruled when following the *Weltover* court mandate.

In this case, the court of appeals' decision demonstrably conflicts with this Court's decision in *Weltover*, and is in conflict with decisions of other Circuit Courts of Appeals on the same matter.

III. UNDER THE INVESTMENT GUARANTY AGREEMENT THE COURTS OF THE UNITED STATES LACK SUBJECT-MATTER JURISDICTION OVER OPIC'S CLAIM.

OPIC's claim is asserted by right of subrogation. OPIC had insured about two-thirds of the value of McKesson's investment in Iran under the United States' investment guaranty program, and had paid the insured amount to McKesson. McKesson asserts a claim in its right for the uninsured portion of its investment.

In Iran's view OPIC's and McKesson's claims in this suit are identical to those finally decided by the Tribunal. *See, Foremost v. Government of Iran*, 10 Iran-U.S. Cl.Trib.Rep. 228 (1986); App. H. and n.2, *supra*. If Iran's view is incorrect and OPIC's suit is a new one, at least OPIC's new suit is in violation of an international agreement between the United States and Iran. *See*, Investment Guaranty Agreement, App. H. Article I, para. 3, of that agreement provides in pertinent part that any claim against the Government of Iran to which the Government of the United States of America may be subrogated as a result of any payment under such guaranty "shall" be the subject of direct negotiation between the two Governments, and if the two Governments are unable to settle the dispute by mutual agreement, the matter "shall" be

referred for final and binding determination to a sole arbitrator to be selected by mutual agreement.

§1604 of the FSIA provides for the primacy of international agreements in existence at the time that Act came into effect. 28 U.S.C. §1604. Thus, under this section, both immunity and the exceptions to immunity are subject to existing international agreements entered into force before the effective date of the FSIA. The FSIA was enacted in 1976, and the Investment Guaranty Agreement entered into force nineteen years earlier. Because the Investment Guaranty Agreement provides the sole avenue for resolving the claims to which it applies, including OPIC's subrogated claim against Iran, the district court lacked subject-matter jurisdiction to hear OPIC's claim against Iran under the FSIA.

OPIC's suit constitutes in essence a suit by the United States against a foreign state in a United States municipal court, and is unprecedented in international law and practice. The quoted language of the investment agreement between the two states is bottomed on, and incorporates, established international custom pursuant to which claims between sovereign states are settled through channels of diplomacy, or through international arbitration or adjudication. None of the jurisdictional provisions of the FSIA confers competence on district courts to adjudicate claims of the United States against foreign states, and the legislative history contains not the slightest suggestion that Congress intended such result.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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